

**KEMAJUAN KUARI (M) SDN BHD v.
PTB SURAMIX SDN BHD & ORS**

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA

[CIVIL APPEAL NO: T-01-307-09-2013]

28 MAY 2015

***TORT:** Conversion – Claim in conversion – Plaintiff obtained approval to extract and remove armour rocks (rocks) from quarry land for Petronas projects – Whether approval given only for polyethylene/ethylene projects and not for all Petronas projects in general – State Government of Terengganu subsequently granted approval to first defendant to operate quarry works on state land adjacent to plaintiff's quarry land – Defendants converted to their own use rocks stockpiled by plaintiff – Whether plaintiff rightful owner of stockpiles – Whether plaintiff could claim for total market value of rocks and rock by-products, costs of constructing infrastructures and for loss of business from defendants*

The State Government of Terengganu ('fourth defendant') through the State Economic Planning Unit ('UPEN') and the Land Administrator of Dungun ('third defendant'), gave approval to the appellant ('plaintiff') to extract and remove armour rocks from a piece of land ('the quarry land'). The approval was to supply armour rocks for Petronas projects. To facilitate removal of the armour rocks and to transport them, the plaintiff constructed an access road, a jetty and a tetrapod. The plaintiff thereafter duly extracted the rocks and stockpiled them at various locations including the State land. Subsequently, the fourth defendant gave approval to Permodalan Terengganu Berhad ('second defendant'), to operate a quarry on the State land adjacent to the plaintiff's quarry land. The actual quarry works were contracted to PTB Suramix Sdn Bhd ('first defendant'). The plaintiff was then denied access to the quarry land and also to its stockpile of armour rocks and rock by-products. Armed with the approval by the third and fourth defendants, the first defendant proceeded to remove the armour rocks and processed rocks from the plaintiff's stockpiles. The plaintiff's grievance, *inter alia*, was that the first to the fourth defendants, by their acts and manipulations, had wrongfully prevented it from extracting armour rocks from the quarry land and had converted to their own use the rocks and rock by-products stockpiled at various locations. Therefore, based on the tort of conversion and misfeasance in public office, the plaintiff claimed against the defendants the total market value of rocks and rock by-products belonging to the plaintiff which the defendants allegedly converted to their own use, costs of constructing infrastructures at the quarry site and for loss of business. In defence, the third and fourth defendants contended that the approval that was given to the plaintiff was only for the polyethylene/ethylene project and not

- A for all or any Petronas projects that required the supply of armour rocks. With the completion of the polyethylene/ethylene project, the armour rocks and quarry products became the properties of the fourth defendant and the plaintiff no longer had any right of ownership over them. As a further justification to deprive the plaintiff of the rocks, it was the fourth defendant's
- B contention that the plaintiff failed to settle the balance of the royalty for the rocks to the third defendant. The High Court Judge dismissed the plaintiff's claim. Hence, the present appeal.

Held (allowing appeal with costs)

Per Abdul Rahman Sebli JCA delivering the judgment of the court:

- C (1) Based on the letter of approval, the approval was for Petronas projects generally and not for any Petronas project in particular. Nowhere in the letter of approval was there any proviso that the approval was only for the polyethylene/ethylene project. The restriction was imposed by the
- D third defendant and not by the fourth defendant. The third defendant being subordinate to the State Authority/UPEN had no power to modify, let alone override the fourth defendant's decision on the terms of the approval. Therefore, the third and fourth defendants' assertion that the approval was only for the polyethylene/ethylene project was rejected. (paras 25, 26 & 27)
- E (2) Even if it is true that the approval given to the plaintiff was only for the purpose of the polyethylene/ethylene project, it was the plaintiff who extracted these rocks and not the first defendant. Therefore, the plaintiff was the rightful owner of the stockpiles notwithstanding the fact that they were kept on State land. It is inconceivable that the defendants
- F could claim ownership of these rocks simply because the first defendant had been given approval by the fourth defendant to remove them from the plaintiff's quarry land. (paras 37 & 38)
- G (3) The first defendant whom the third and fourth defendants had given approval to operate the quarry had removed and sold all of the processed rocks from the plaintiff's stockpile. Therefore, the third and fourth defendants' claim that the plaintiff failed to settle the outstanding royalty payment was baseless. (para 39)
- H (4) The acts of the third and fourth defendants in approving the second defendant's entry into the quarry land who then removed the processed rocks through the first defendant was wrongful as the plaintiff had a subsisting right to carry out quarry operations on the quarry land. Therefore, liability for conversion had been established against all four defendants. (para 42)
- I (5) The allegation of misfeasance in public office was directed at the third and/or fourth defendant. There was no need to name the public officer concerned. It was sufficient to name his office. The third and fourth defendants' wrongful acts in the conversion of the plaintiff's goods were

- committed repetitiously despite many written complaints by the plaintiff. This was done with improper motive and in bad faith to injure the plaintiff. (paras 43, 45 & 46) A
- (6) The law does not allow for double recovery of damages. Therefore, damages may more appropriately be awarded under the tort of conversion rather than the tort of misfeasance in public office. The plaintiff must bear its own costs for the infrastructures as they were not built on the third and fourth defendants' instructions. The third and fourth defendants should not be burdened with costs which the plaintiff incurred voluntarily to serve its own interest and for its own benefit. (paras 47 & 49) B C
- (7) The defendants did not challenge nor adduce any evidence to contradict the evidence of the plaintiff on the value of the rocks at the plaintiff's stockpiles. Therefore, the third and fourth defendants' contention that the plaintiff failed to prove the sums claimed was without merit. (para 53) D
- (8) The plaintiff's claim for loss of business was not supported by any evidence and was speculative. Therefore, the plaintiff's claim for loss of business was dismissed. (para 56)
- (9) The trial judge was wrong in dismissing the plaintiff's claim for conversion of its stockpile of rocks and rock by-products. The plaintiff had adduced sufficient evidence to establish the claim on the balance of probabilities. (para 58) E

Bahasa Malaysia Headnotes

Kerajaan Negeri Terengganu ('defendan keempat') melalui Unit Perancangan Ekonomi Negeri ('UPEN') dan Pentadbir Tanah Negeri Dungun ('defendan ketiga'), memberi kelulusan kepada perayu ('plaintif') untuk mengekstrak dan mengeluarkan bongkah batu daripada sebidang tanah ('tanah kuari'). Kelulusan ini adalah untuk membekalkan bongkah batu untuk projek Petronas. Bagi memudahkan penyingkiran bongkah batu dan untuk mengangkutnya, plaintif membina jalan akses, jeti dan tetrapod. Plaintif kemudian dengan sewajarnya mengekstrak batu dan menyimpan stoknya di pelbagai lokasi termasuk di tanah Kerajaan Negeri. Kemudian, defendan keempat memberi kelulusan kepada Permodalan Terengganu Berhad ('defendan kedua'), untuk mengendalikan kuari di tanah Kerajaan Negeri bersebelahan dengan tanah kuari plaintif. Kerja-kerja kuari sebenar dikontrakkan kepada PTB Suramix Sdn Bhd ('defendan pertama'). Plaintif kemudiannya dinafikan akses ke tanah kuari dan juga simpanan stok bongkah batu dan produk-produk sampingan batu. Berbekalkan kelulusan oleh defendan ketiga dan keempat, defendan pertama meneruskan dengan mengeluarkan bongkah batu dan batu yang diproses dari simpanan stok plaintif. Kilanan plaintif, antara lain, adalah bahawa defendan pertama F G H I

- A hingga keempat, melalui tindakan dan manipulasi mereka secara salah, menghalangnya daripada mengekstrak bongkah batu dari tanah kuari dan menukarkan batu dan produk-produk sampingan batu dalam simpanan stok di pelbagai lokasi untuk kegunaan sendiri mereka. Oleh itu, berdasarkan tort penukaran dan misfeasans dalam pejabat awam, plaintif menuntut terhadap
- B responden-responden jumlah nilai pasaran batu dan produk-produk sampingan batu milik plaintif yang responden-responden didakwa menukar untuk kegunaan sendiri, kos membina infrastruktur di tapak kuari dan untuk kerugian perniagaan. Dalam pembelaannya, defendan ketiga dan keempat menegaskan bahawa kelulusan yang diberikan kepada plaintif hanya untuk
- C projek polyethylene/ethylene dan bukan bagi semua atau mana-mana projek Petronas yang memerlukan bekalan bongkah batu. Dengan penyiapan projek polyethylene/ethylene, bongkah batu dan produk kuari menjadi harta defendan keempat dan plaintif tidak lagi mempunyai apa-apa hak milikan terhadapnya. Sebagai justifikasi selanjutnya untuk menafikan plaintif terhadap batu-batu tersebut, defendan keempat menghujahkan bahawa
- D plaintif gagal menjelaskan baki royalti bagi batu-batu tersebut kepada defendan ketiga. Hakim Mahkamah Tinggi menolak tuntutan plaintif. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)

- E **Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:**

- (1) Berdasarkan surat kelulusan, kelulusan adalah untuk projek-projek Petronas secara umum dan bukan untuk mana-mana projek Petronas yang khusus. Dalam surat kelulusan tiada apa-apa proviso bahawa
- F kelulusan itu hanya untuk projek polyethylene/ethylene. Sekatan dikenakan oleh defendan ketiga dan bukan oleh defendan keempat. Defendan ketiga sebagai subordinat kepada Pihak Berkuasa Negeri/UPEN tidak mempunyai kuasa untuk mengubah suai, apatah lagi mengatasi keputusan defendan keempat terhadap syarat-syarat
- G kelulusan. Oleh itu, dakwaan defendan ketiga dan keempat bahawa kelulusan itu hanya untuk projek polyethylene/ethylene ditolak.
- (2) Sekalipun benar bahawa kelulusan diberikan kepada plaintif hanya untuk tujuan projek polyethylene/ethylene, plaintif yang mengekstrak batu-batu ini dan bukannya defendan pertama. Oleh itu, plaintif adalah
- H pemilik sah simpanan stok walaupun ia disimpan di tanah kerajaan. Mustahil bahawa defendan-defendan boleh menuntut hak milik batu-batu ini hanya kerana defendan pertama diberi kelulusan oleh defendan keempat untuk mengeluarkannya dari tanah kuari plaintif.
- (3) Defendan pertama yang diberi kelulusan oleh defendan ketiga dan
- I defendan keempat untuk mengendalikan kuari telah mengeluarkan dan menjual semua batu-batu yang diproses dari simpanan stok plaintif. Oleh itu, tuntutan defendan ketiga dan defendan keempat bahawa plaintif gagal menjelaskan bayaran royalti yang tertunggak adalah tidak berasas.

- (4) Tindakan defendan ketiga dan defendan keempat meluluskan kemasukan defendan kedua ke tanah kuari dan mengeluarkan batu yang diproses melalui defendan pertama adalah salah kerana plaintif mempunyai hak untuk menjalankan operasi kuari di tanah kuari. Oleh itu, liabiliti bagi penukaran dibuktikan terhadap keempat-empat defendan. A
- (5) Dakwaan misfeasans dalam pejabat awam ditujukan kepada defendan ketiga dan/atau defendan keempat. Tiada keperluan untuk menamakan pegawai awam berkenaan. Adalah mencukupi untuk menamakan pejabatnya. Tindakan salah defendan ketiga dan defendan keempat dalam penukaran barangan plaintif dilakukan berulang kali meskipun banyak aduan bertulis dilakukan oleh plaintif. Ini dilakukan dengan motif yang tidak wajar dan dengan niat jahat untuk menyebabkan kehilangan kepada plaintif. B
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- (6) Undang-undang tidak membenarkan pemulihan ganti rugi berganda. Oleh itu, ganti rugi lebih sesuai diawardkan di bawah tort penukaran berbanding tort misfeasans di pejabat awam. Plaintif perlu menanggung kosnya sendiri untuk infrastruktur kerana ia tidak terbina atas arahan defendan ketiga dan defendan keempat. Defendan ketiga dan defendan keempat sepatutnya tidak dibebani dengan kos yang ditanggung secara sukarela oleh plaintif dalam menjalani kepentingannya dan untuk manfaatnya sendiri. D
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- (7) Defendan-defendan tidak mencabar mahupun mengemukakan apa-apa keterangan untuk menyangkal keterangan plaintif mengenai nilai batu-batu dalam simpanan stok plaintif. Oleh itu, hujahan defendan ketiga dan defendan keempat bahawa plaintif gagal membuktikan jumlah dituntut tidak bermerit. F
- (8) Tuntutan plaintif bagi kehilangan perniagaan tidak disokong oleh apa-apa keterangan dan adalah spekulatif. Oleh itu, tuntutan plaintif bagi kerugian perniagaan ditolak.
- (9) Hakim bicara terkhilaf dalam menolak tuntutan plaintif bagi penukaran simpanan stok batu-batu dan produk-produk sampingan batu. Plaintif telah mengemukakan keterangan yang mencukupi untuk membuktikan tuntutannya atas imbalan kebarangkalian. G

Case(s) referred to:

- Bourgoin SA and Others v. Ministry of Agriculture, Fisheries and Food* [1986] 1 QB 716 (*refd*) H
- Development & Commercial Bank Bhd v. Liew Weng Hang & Ors* [2007] 6 CLJ 260 CA (*refd*)
- Dunlop v. Woollahra Municipal Council* [1982] AC 158 (*refd*)
- Kuwait Airways Corporation v. Iraqi Airways Company & Ors (Nos 4 and 5)* [2002] 2 AC 883 (*refd*) I
- Three Rivers DC v. Governor and Company of the Bank of England (No 2)* [2000] 2 WLR 1220 (*refd*)

A Legislation referred to:

National Land Code, s. 70
Rules of the High Court 1980, O. 42 r. 12

For the appellant - Tee Geok Hock; M/s GH Tee & Co

For the 1st respondent - Rosli Ahmad; SFC

B *For the 2nd respondent - A Zamani Mohammad (Hazri Haris with him);
M/s Zamani Mohammad & Co*

*For the 3rd & 4th respondents - Azhar Abdul Hamid (Shaharaliza Ab Razak with him);
State Legal Advisor, Terengganu*

Reported by Sandra Gabriel

C

JUDGMENT

Abdul Rahman Sebli JCA:

The Claim

D [1] The appellant's claim against the respondents was for a sum of RM14,355,839.69 being the total market value of rocks and rock by-products belonging to the appellant which the respondents allegedly converted to their own use, RM9,898,000 for costs of constructing infrastructures at the quarry site and RM91,200,000 for loss of business. The claim was founded on the tort of conversion and misfeasance in public office.

E [2] After a full trial at the Kuala Terengganu High Court, the learned trial judge found in favour of the respondents and dismissed the appellant's claim with costs. This is the appellant's appeal against the whole of the decision.

F [3] The learned judge who tried the case had gone on early retirement and did not provide any grounds of judgment. We do not, therefore, have the benefit of the trial court's reasoning for dismissing the plaintiff's claim nor its findings on crucial issues of fact. It thus fell upon us to review the entire evidence and to come to our own findings. We heard arguments on 26 March 2015 and we reserved judgment, *curia advisari vult*. We have now reached a unanimous decision and this is our judgment.

G [4] We shall refer to the parties as they were in the High Court, ie the appellant as the plaintiff and the respondents as the first, second, third and fourth defendants in that order. The first defendant had been wound up on 20 March 2007 and was represented by the official receiver in this appeal.

H The Background Facts

I [5] The salient facts have been set out, quite accurately in our view, by learned counsel for the plaintiff and can be summarised as follows. The plaintiff and the first defendant are private companies limited by shares both having their registered addresses at Kuala Terengganu, Terengganu Darul Iman whilst the second defendant is a public company having its registered address at Petaling Jaya, Selangor Darul Ehsan.

[6] The first defendant is a subsidiary of the second defendant and is owned and controlled by the second defendant. The second defendant on the other hand is a subsidiary of the fourth defendant (the State Government) and is its investment arm. A

[7] Pursuant to the plaintiff's application, the fourth defendant through the State Economic Planning Unit ("UPEN") and the third defendant, gave approval in principle to the plaintiff to extract and remove armour rocks (batu pejal @ bongkah batu) from a piece of land at Pasir Panjang beach, Mukim Kuala Paka, Dungun Terengganu ("the quarry land"). These armour rocks were meant for the Petronas projects subject to the terms and conditions imposed by the third and fourth defendants. The material part of the approval letter which is dated 13 September 1992 reads as follows: B C

Adalah dengan hormatnya saya menarik perhatian tuan kepada perkara di atas. Permohonan tuan untuk mengambil dan mengalih bahan batu-batuan 'Batu Pejal' daripada kawasan yang dipohonkan di Pasir Panjang bagi melaksanakan Projek-Projek Petronas sahaja adalah diluluskan pada dasarnya. D

[8] The approval was therefore to supply armour rocks for "Projek-Projek Petronas" (Petronas projects). No expiry date was fixed nor the duration of the approval. To facilitate removal of the armour rocks and to transport them from the quarry land to the Polyethylene/Ethylene project and later to the Kerteh Breakwater project, the plaintiff constructed the necessary infrastructures, namely: E

- (i) an access road to the quarry land, jetty and tetrapod yard;
- (ii) a jetty at Tepi Pantai Pasir Panjang, Mukim Kuala Paka, Dungun for the Polyethylene/Ethylene project; and F
- (iii) a tetrapod yard for the Kerteh Breakwater project.

[9] According to the plaintiff, it spent RM2,198,000 on the access road, RM6 million on the jetty and RM1.7 million on the tetrapod yard. To facilitate the quarry operations, temporary occupation licences (TOL) were granted to the plaintiff by the third defendant for occupation of the jetty and the tetrapod yard. G

[10] The premium payable for the rocks to be extracted from the quarry land was fixed at RM1.80 per cubic meter, which was to be paid to the third defendant. Pursuant to the approval, various Form C permits were issued to the plaintiff by the third defendant from June 1994 until December 2000 for the extraction and removal of the armour rocks. The plaintiff duly extracted the rocks and stockpiled them at various locations including on rented private lands as well as on the State's beach land. This was done with the knowledge and consent of the third defendant. H I

A The Dispute

[11] Everything changed in 1996 when the fourth defendant through UPEN gave approval to its investment arm, the second defendant, to operate a quarry on 28.32 hectares of State land adjacent to the plaintiff's quarry land. The actual quarry works were, however, contracted to the first defendant.

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[12] Two years later, by letter dated 20 July 1998, the third defendant told the plaintiff that it no longer had any right to carry out quarry operations on the quarry land as the quarry operations had been approved to the second defendant since 12 July 1996. The plaintiff was denied access to the quarry land and thus to its stockpile of armour rocks and rock by-products.

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[13] Armed with the approval by the third and fourth defendants, the first defendant from mid-1998 to 2000 proceeded to remove the armour rocks and processed rocks from the plaintiff's stockpiles. The plaintiff's written complaints to the third and fourth defendants fell on deaf ears. This fact has been documented and can be found in the appellant's core bundle (ACOB) at pp. 17-26.

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The Plaintiff's Grievance

[14] The plaintiff's grievance was that the first to the fourth defendants by their acts and manipulations had wrongfully prevented it from extracting the armour rocks from the quarry land and had converted to their own use the rocks and rock by-products stockpiled at the various locations and had further unlawfully prevented it from using the jetty to transport the stockpiles out.

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[15] The plaintiff's estimation of the value of the rocks and rock by-products stockpiled at the beach land was RM4,204,435.42 and RM10,151,404.27 for the rocks stockpiled at the private lands, totalling RM14,355,839.69.

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The Respective Defence Case

[16] The first defendant did not deny removing the rocks but justified it by saying that it had been given approval to do so by UPEN. The second defendant's defence, on the other hand, was that it was not involved at all in the removal of the rocks. Instead, the second defendant pushed the entire blame on the first defendant, its own subsidiary which has been wound up.

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[17] As for the third and fourth defendants, they did not deny preventing the plaintiff from extracting and removing rocks from the quarry land and from using the jetty. Their position, however, is that with the completion of the polyethylene/ethylene project in 1995, the armour rocks and quarry products became the properties of the fourth defendant and the plaintiff no longer had any right of ownership over them.

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[18] The basis for the argument is that since the approval for the extraction of the armour rocks was only for the purpose of the polyethylene/ethylene project, the plaintiff's rights over the rocks came to an end when this particular project was completed in 1995. The sequel to the argument is that it was lawful for the first and second defendants to remove and sell the rocks, which were lying on State land, to third parties.

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[19] As a further justification to deprive the plaintiff of the rocks, it was the fourth defendant's case that the plaintiff failed to settle the balance of the royalty for the rocks to the third defendant as agreed. According to defence witness SD2, the plaintiff failed to settle the outstanding royalty payments from December 1994.

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Conversion

[20] The question is whether by their acts, the defendants had committed the tort of conversion. As to what in law constitutes conversion, the learned authors of *Winfield and Jolowicz on Tort*, 15th edn. 1998 describe the misdemeanour as follows:

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Conversion at common law may be committed in so many different ways that any comprehensive definition is probably impossible but the connecting thread running through the cases seems to be that the wrong is committed by dealing with the goods of a person which constitutes an unjustifiable denial of his rights in them or the assertion of rights inconsistent therewith. Thus it may be committed by wrongfully taking possession of goods, by wrongfully disposing of them, by wrongfully destroying them or simply by wrongfully refusing to give them up when demanded, for in all these cases can be traced conduct by the Respondent/Defendant which amounts to a denial of the Appellant/Plaintiff's rights or the assertion of inconsistent rights.

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[21] In *Development & Commercial Bank Bhd v. Liew Weng Hang & Ors* [2007] 6 CLJ 260 the Court of Appeal held, *inter alia*, that conversion is a tort of strict liability. At p. 265, Gopal Sri Ram JCA (as he then was) delivering the judgment of the court, explained:

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Because conversion is a tort of strict liability, the rule as to remoteness of damage governing it is that of direct consequences. In short, a tortfeasor who commits conversion is liable for all the harm that is the direct consequence of his act.

[22] The tort of conversion can be committed by various persons each of whom in a series of conversions wrongfully excluded the owner from the possession of his goods (see the House of Lords' decision in *Kuwait Airways Corporation v. Iraqi Airways Company & Ors (Nos 4 and 5)* [2002] 2 AC 883). It was held in that case that where there are multiple tortfeasors who commit the tort of conversion in respect of the same goods belonging to the same plaintiff, each tortfeasor is liable to pay damages to the plaintiff for his tort of conversion.

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- A [23] It is the plaintiff's contention that it did not at any material time commit any breach of the terms of the approval and neither had it been issued with any termination letter by the fourth defendant. This is undisputed and in fact admitted by the third defendant through SD1 and SD2 in their testimonies under cross-examination. When asked to confirm that the plaintiff did not breach any term of the approval this was SD1's answer:
- B

PC: Setuju bahawa mengikut rekod-rekod UPEN sebenarnya Kemajuan Kuari tidak melakukan kesalahan dalam menjalankan urusan kuari?

SD1: Dalam rekod UPEN memang tidak ada.

- C [24] As alluded to earlier, the third and fourth defendants' defence was that the approval that was given to the plaintiff was only for the polyethylene/ethylene project and not for all or any Petronas projects that required the supply of armour rocks. The starting point for any discussion on this issue has to be the approval letter itself the material portion of which we have reproduced in para. 7 above.
- D

- E [25] Our first observation with regard to this letter of approval is that any person with a decent understanding of the Malay language will come to the conclusion that the approval was for Petronas projects generally and not for any Petronas project in particular. But of course it must be confined to the area where the quarry operation was to be carried out. What is clear is that nowhere in the letter is there any proviso that the approval was only for the polyethylene/ethylene project.

- F [26] The restriction was in fact imposed by the third defendant *vide* letter dated 22 September 1993 and not by the fourth defendant who was the authority to define the scope of approval as provided by s. 70 of the National Land Code. Clearly the third defendant being subordinate to the State Authority/UPEN had no power to modify, let alone override the fourth defendant's decision on the terms of the approval.

- G [27] Under cross-examination by learned counsel for the plaintiff, defence witness SD1 candidly admitted that "UPEN tidak ada kuasa". We, therefore, reject the third and fourth defendants' assertion that the approval was only for the polyethylene/ethylene project. In any event, the rocks extracted by the plaintiff were indeed meant for the polyethylene/ethylene project. There is no evidence to suggest otherwise.

- H [28] UPEN had also admitted at the trial that it did not check whether or not the Petronas projects were still subsisting at the time it issued the approval to the second defendant. This is odd given that the reason why it granted approval to the second defendant to operate the quarry in the first place was because the Petronas projects had been completed and there was thus no further need for the supply of armour rocks.
- I

[29] The evidence further shows that the first defendant did not carry out any blasting or quarry operation despite applying for and given approval to carry out such activities. This is not surprising as neither the second nor the first defendant had any prior experience in quarry operations. Perhaps to make up for their lack of experience, what the second and first defendants did instead was to tell the fourth defendant to issue a letter (which the fourth defendant obliged) to confirm that the second defendant had the “sole and exclusive rights” over the armour rocks. We have no doubt that the intention was to override the plaintiff’s ownership of its stockpile of rocks and rock by-products. From the plaintiff’s point of view this reeks of a rip off.

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[30] After giving approval to the second defendant to carry out quarry operations at the quarry land, the third defendant followed it up by rejecting the plaintiff’s application for extension of the TOL for the jetty. Without the use of the jetty there was no way the plaintiff could transport out their stockpile of armour rocks and quarry products from the quarry land.

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[31] It was a calculated move by the third defendant. We are constrained to agree with the plaintiff that this was a pretext by the third and fourth defendants to deny the plaintiff of the use of the jetty and therefore access to its stockpile of rocks and rock by-products on the quarry land. The intention obviously was to facilitate the taking over of the plaintiff’s rock stockpiles by the first defendant.

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[32] With the benefit of these overt acts by the third and fourth defendants, the first defendant on numerous occasions from 1998 to 2000 proceeded to remove the plaintiff’s stockpiles from the quarry land and other locations and supplied them to the Petronas projects. There can be no argument that this had caused loss to the plaintiff and unlawful gain to the first defendant.

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[33] Evidence was led that at the meeting on 13 August 2000 held at UPEN’s office, the Dungun Land Office was directed by the Deputy Director of UPEN to give written reasons with regard to the following matters:

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- (a) Why was the plaintiff not allowed to continue work on the quarry land?
- (b) Why was the plaintiff not allowed to remove the stockpiles of extracted rocks at the Government and private lands?
- (c) Why was the first defendant allowed to enter and remove the plaintiff’s stockpile of extracted rocks from the quarry land and from the rented private lands?

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[34] First of all, we find it rather strange for the fourth defendant (through UPEN) to seek answers to these questions from the Dungun Land Office when it was the fourth defendant itself who instructed the first defendant to remove and sell the rocks from the plaintiff’s stockpiles. For reasons best known to itself, the Dungun Land Office did not respond to the instruction

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- A despite written reminders by UPEN and the firm of Jacob Goldie & Toh acting for the plaintiff. Whatever may be the reason for the clam up, the failure by the Dungun Land Office to respond cannot absolve the third and fourth defendants of liability for the conversion.
- B [35] The Dungun Land Office is subordinate to both the third and fourth defendants. Therefore, its failure to respond must be taken as failure by the third and fourth defendants themselves to provide answers to those questions. In any event, the buck ends with the fourth defendant, being the ultimate authority on land matters. In all probability the third and fourth defendants already knew the answers to those questions as the second defendant in its
- C letter dated 15 October 1998 had written to UPEN acknowledging that the plaintiff had ownership rights over the existing stockpiles unless it had been granted exclusive rights over the land. The truth in our view is that the third and fourth defendants had no valid answer to any of the questions as they knew that the first defendant was illegally removing rocks and rock
- D by-products belonging to the plaintiff.
- [36] The date of the meeting, ie 13 August 2000 is important in the whole scheme of things. The significance of the date is that it debunks the third and fourth defendants' assertion that by 1995 the Petronas projects had been completed and that therefore the plaintiff had no reason to continue with the
- E quarry operations. Implicit in questions (b) and (c) posed by the Deputy Director of UPEN above is an admission that the rocks and rock by-products rightfully belonged to the plaintiff.
- [37] In our view, this is so even if it is true that the approval given to the plaintiff was only for the purpose of the polyethylene/ethylene project as
- F claimed by the third and fourth defendants. What is clear to our mind is that since it was the plaintiff who extracted these rocks and not the first defendant, the plaintiff was therefore the rightful owner of the stockpiles notwithstanding the fact that they were kept on State land.
- G [38] It is inconceivable that the defendants could claim ownership of these rocks simply because the first defendant had been given approval by the fourth defendant to remove them from the plaintiff's quarry land. What they did not own they cannot claim as theirs just because the first defendant had been given "approval" by the State Authority.
- H [39] With regard to the third and fourth defendants' claim that the plaintiff failed to settle the outstanding royalty payment, we find the claim to be baseless. The unchallenged evidence shows that the first defendant whom the third and fourth defendants had given approval to operate the quarry had removed and sold all of the processed rocks from the plaintiff's stockpiles.
- I The stockpiles were sold to See Song & Sons Sdn Bhd who in turn supplied them to Petronas for the polyethylene Marine Facilities Phase II.

[40] Further, there was a mutual agreement between the land office and the plaintiff that instalment payments for the royalties were to be made as and when the processed rocks were removed from the stockpiles. This can be seen from the evidence of the director of the plaintiff (SP7) and the evidence of the assistant land officer (SP9) who confirmed that this was common practice with the land office.

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[41] On the evidence and having regard to the probabilities of the case it is our finding that the first, second, third and fourth defendants' acts fall squarely within the meaning of conversion as described by the learned authors of *Winfield & Jolowicz* quoted above and the decision of the House of Lords in *Kuwait Airways Corp v. Iraqi Airways Co (Nos 4 and 5) (supra)*.

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[42] We further agree with learned counsel for the plaintiff that the acts of the third and fourth defendants in approving the second defendant's entry into the quarry land who then removed the processed rocks through its contractor, the first defendant was wrongful as the plaintiff had a subsisting right to carry out quarry operations on the quarry land. It is our finding that liability for conversion had been established against all four defendants.

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Misfeasance In Public Office

[43] The allegation of misfeasance in public office was directed at the third and/or fourth defendant. In *Bourgoin SA and Others v. Ministry of Agriculture, Fisheries and Food* [1986] 1 QB 716, the English Court of Appeal (per Oliver LJ) on the facts of the case made the following observations on the tort of misfeasance in public office:

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- (a) the tort of misfeasance in public office is well established (following *Dunlop v. Woollahra Municipal Council* [1982] AC 158);
- (b) although some cases in Canada and Australia seem to require "targeted malice", ie improper motive specifically aimed at the plaintiff, such suggestion is entirely inconclusive and there are also strong indications in the other direction;
- (c) under the English law of torts, the tort of misfeasance in public office requires as a necessary element either malice or knowledge of the invalidity;
- (d) if an act is done deliberately and with knowledge of its consequences, the actor cannot sensibly say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them.

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[44] Both the third and fourth defendants denied the allegation of misfeasance in public office. It was argued by learned counsel for the third and fourth defendants that the allegation cannot be sustained for the reason that the plaintiff failed to name the officers alleged to have committed the

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- A tortious acts. It was further argued that the decision to approve the quarry operation was made by the State Executive Council (MMKN) and not the third defendant and that since the MMKN was not named as a party in this action, the plaintiff's action founded as it was on misfeasance in public office must fail. No authority was cited in support of the proposition.
- B [45] In our view, counsel's argument is misconceived. There is no need to name the public officer concerned. It is sufficient to name his office. In *Three Rivers DC v. Governor and Company of the Bank of England (No 2)* [2000] 2 WLR 1220 the House of Lords described the tort as the only tort available solely against public authorities or persons holding public office. It consists of an
- C abuse of power by a public authority or person holding public office that is affected by malice or bad faith and that deprives the plaintiff of some benefit or causes him some loss. Government departments, local authorities, and courts and tribunals are all public authorities (See *Oxford Dictionary of Law*, 7th edn.).
- D [46] Having regard to the evidence before the court we are in agreement with the plaintiff that the third and fourth defendants' wrongful acts in the conversion of the plaintiff's goods were committed repetitiously over a period of almost two years despite many written complaints by the plaintiff. We agree that this was done with improper motive and in bad faith to injure
- E the plaintiff, as evidenced in particular by the following circumstances:
- (i) the second defendant's refusal to renew the TOL for the jetty on a false pretext, ie that the "projek telah tamat" despite knowing that the jetty was vital for transporting the rocks to the Petronas projects;
 - (ii) the fourth defendant instructed the first defendant to remove and sell rocks from the plaintiff's stockpiles without regard for the plaintiff's rights;
 - (iii) the fourth defendant's approval (through UPEN) was for the second defendant to operate outside the plaintiff's quarry land, yet the third and
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- G fourth defendants allowed the first defendant (subsidiary of the second defendant) to remove and sell rocks from the plaintiff's stockpiles;
- (iv) the third defendant refused to provide the plaintiff with a copy of the approved plan for the second defendant's quarry land in spite of the plaintiff's written request by letter dated 13 September 1998; and
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- (v) the second defendant asked UPEN to confirm that the plaintiff had no Petronas projects to supply the rocks to when it knew that this was untrue.

Measure Of Damages

- I [47] We now come to the measure of damages. As the law does not allow for double recovery of damages, the market values of the armour rocks and rock by-products can only be awarded once, either under the tort of

conversion or the tort of misfeasance in public office. As between the two, it is our considered view that damages may more appropriately be awarded under the tort of conversion.

[48] The first item claimed by the plaintiff was the expenses incurred in constructing the infrastructures totalling RM9,898,000. According to the plaintiff, it is entitled to the costs of constructing these infrastructures as they were necessary for the quarry operations. In our considered view and taking into account the third and fourth defendants' submission on this point, the plaintiff is not entitled to these costs.

[49] We are in agreement with the third and fourth defendants that the plaintiff must bear its own costs for these infrastructures as they were not built on the third and fourth defendants' instructions. No doubt they were necessary for the quarry operations but the third and fourth defendants should not be burdened with costs which the plaintiff incurred voluntarily to serve its own interest and for its own benefit.

[50] We shall next consider whether the plaintiff is entitled to compensation for the rocks and rock by-products which were the subject of conversion by the defendants. To begin with, the fact that these rocks were in existence is irrefutable as shown by the following evidence:

- (a) The photos at pp. 1-12 of the common bundle vol. 5;
- (b) The evidence of Engineer Yong Hee Leong (SP1);
- (c) The survey report of the licensed surveyor Tan Gaik Leong (SP2); and
- (d) The evidence of SP7 who testified that the plaintiff stockpiled the armour rocks and quarry products at the various locations.

[51] We have stated earlier that the plaintiff's estimation of the total value of the rocks and quarry products stockpiled at the beach land was RM4,204,435.42 and the value of those stockpiled at the rented private lands was RM10,151,404.27, giving a grand total of RM14,355,839.69. The prices and values of these rocks at the time of conversion had been substantiated by the quantity surveyor (SP8) and supported by his report at exh. P77.

[52] The unit prices and values of the rocks had also been confirmed by the quarry supervisor (SP5) and the quarry administrative and finance manager (SP6). The detailed breakdown of the sums claimed had been tabulated by the plaintiff through their witnesses and the documentary evidence and we do not see any need to reproduce them in this judgment.

[53] What is relevant to note is that the defendants did not challenge nor adduce any evidence to contradict the evidence of the plaintiff's witnesses on the quantities, unit prices or the values of the rocks at the plaintiff's

A stockpiles. Their evidence is, therefore, deemed to be admitted. We do not, therefore, see any merit in the third and fourth defendants' contention that the plaintiff failed to prove the sums claimed.

B [54] Having given careful consideration to the matter, we are satisfied that the plaintiff is entitled to these sums. Accordingly we order that the sum of RM14,355,839.69 be paid to the plaintiff with interest at the rate of 8% per annum from the date of accrual until the date of full settlement.

C [55] The plaintiff had also claimed for loss of business. It was submitted that if not for the misfeasance in public office by the third and fourth defendants the plaintiff could have continued to supply rocks to five Petronas projects, namely Pemecah Ombak, Pulau Duyung, Kuala Terengganu, Pemecah Ombak, Pantai Primula, Kuala Terengganu, Pemecah Ombak, Kuala Kemaman, Pemecah Ombak, Marang and the Terengganu Airport Runway.

D [56] The loss of business according to the plaintiff was to the tune of RM91,200,000. Having gone through the record of appeal, we do not find the claim to be supported by any evidence. The claim is obviously predicated on the plaintiff's belief that these five projects would be awarded to it. This is speculative at best. We therefore dismiss the plaintiff's claim for loss of business.

E [57] As for computation of the interest rate on the judgment sum of RM14,355,839.69, we agree with learned counsel that the date of accrual should be 1 July 1999 as the tortious acts of conversion were committed over a period of many months between July 1998 and the first half of 2000. We fix interest at 8% per annum as the applicable law for any suit filed in or before 2002 is the provisions of O. 42 r. 12 of the Rules of the High Court 1980. The plaintiff's action was filed in 2002.

Conclusion

G [58] For all the reasons aforesaid, we find that the learned trial judge was wrong in dismissing the plaintiff's claim for conversion of its stockpile of rocks and rock by-products. It is our finding that the plaintiff had adduced sufficient evidence to establish the claim on the balance of probabilities. We, therefore, set aside the trial court's order and substitute it with an order that the plaintiff's claim be allowed with costs. Order accordingly.

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